Chan Kam Tai (F) v Kong Pen Keong

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO MT-1–24–4190 OF 2006
VERNON ONG JC
24 MARCH 2008

Family Law — Children — Custody — Application for — Children below seven years of age — Presumption in favour of mother — Whether presumption rebutted — Whether children would be adversely affected by change in custody — Law Reform (Marriage and Divorce) Act 1976 s 88(3)

This was an application by the applicant wife for custody care and control of her two daughters with reasonable access for the respondent husband, together with maintenance for the said daughters of RM1,500 per month. Both the children were below the age of seven years at the time of the hearing of the application. Since birth the children were in the care of the applicant, assisted by her mother who also provided the matrimonial home for the parties. However, as a result of matrimonial differences, the respondent left the matrimonial home taking along the children, whom were subsequently cared for by the respondent's mother in Kuala Lumpur. The applicant submitted that the presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 operated in her favour. The onus was on the respondent to rebut the same. It was also submitted that in this case the court had to disregard the disputed facts and decide the case solely on the undisputed facts. The respondent, on the other hand, submitted that the children were not forcibly taken away by the respondent. Reference was made to a joint petition which stated that the parties would have joint custody care and control of the children and that they would stay with the respondent's mother in Kuala Lumpur with reasonable access to the applicant. The joint petition, was, however subsequently abandoned and the parties though separated, remained legally married. The respondent further submitted that the applicant was not denied access to the children. However, the access was subject to non-disruption of the children's schedule and other conditions. He furtherl submitted that it was undesirable to disturb the children's life by changes of custody as they were now leading a stable life in a good environment in Kuala Lumpur under the care of their paternal grandmother.

Held:

(1) In the light of the conflicting versions of facts asserted by each party and

in the absence of oral evidence or cross-examination, the court must ignore the disputed allegations. The court must decide by consideration of the undisputed facts (see *Gan Koo Kea v Gan Shiow Lih (F)* [2003] 4 MLJ 770). In this case s 88(3) presumption ought not be held in abeyance in considering all the relevant factors in deciding custody (see para 15).

(2) The respondent had not adduced sufficient evidence to rebut the presumption under s 88(3). In the absence of evidence to the contrary, it was wrong for the respondent to speculate that the children would be adversely affected by the change in custody (see paras 9, 19 & 24).

(3) In this case there was nothing in the undisputed facts to show that the applicant was unable to provide the children with an adequate home environment. The applicant was gainfully employed as a beautician with an income of about RM3,500 a month. There was also nothing to militate against the applicant in respect of her ability to shower love and affection on the children (see para 20).

(4) In the circumstances of the case, keeping the children with the respondent's mother in Kuala Lumpur would be undesirable. The applicant was working in Johor Bahru whilst the respondent worked in Singapore. This places the children far away from both their mother and father, which meant that the children would get to see very little of their mother and father. At the children's tender age, this was plainly undesirable. It was therefore impracticable for the children to remain under the care of the respondent's mother in Kepong, Kuala Lumpur (see para 22).

[Bahasa Malaysia summary

Ini adalah permohonan pemohon isteri untuk hak penjagaan dan kawalan ke atas kedua-dua anak perempuannya dengan akses yang munasabah kepada responden suami, bersama dengan nafkah untuk anak-anak tersebut sebanyak RM1,500 sebulan. Kedua-dua anak tersebut di bawah umur tujuh tahun pada masa perbicaraan permohonan. Semenjak anak-anak tersebut dilahirkan, mereka di bawah jagaan pemohon, dibantu oleh ibunya yang memberikan kediaman perkahwinan kepada kedua-dua pihak. Walau bagaimanapun, akibat daripada pertikaian perkahwinan responden telah meninggalkan kediaman perkahwinan tersebut dan membawa bersamanya kanak-kanak tersebut yang kemudiannya dijaga oleh ibu responden di Kuala Lumpur. Pemohon menghujah bahawa anggapan di bawah s 88(3) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 memihak kepadanya. Beban adalah di pihak responden untuk mematahkannya. Ia juga dihujahkan bahawa dalam kes ini mahkamah sepatutnya mengabaikan fakta-fakta yang dipertikaikan dan memutuskan kes hanya atas fakta-fakta

yang tidak dipertikaikan. Sebaliknya responden menghujah bahawa kanak-kanak tersebut tidak diambil secara paksa oleh responden. Rujukan dibuat kepada petisyen bersama yang menyatakan pihak-pihak akan mempunyai hak penjagaan dan kawalan bersama ke atas kanak-kanak tersebut dan mereka akan tinggal bersama ibu responden di Kuala Lumpur dengan akses munasabah kepada pemohon. Akan tetapi, petisyen bersama, kemudiannya diabaikan dan pihak-pihak walaupun berpisah, masih berkahwin di sisi undang-undang. Responden selanjutnya menghujah bahawa pemohon tidak dinafikan akses terhadap kanak-kanak tersebut. Akan tetapi, akses tertakluk supaya tidak mengganggu jadual dan syarat-syarat lain. Beliau selanjutnya menghujah bahawa tidak wajar untuk mengganggu kehidupan kanak-kanak tersebut dengan menukar hak penjagaan kerana mereka kini menjalani hidup yang stabil dalam suasana yang baik di Kuala Lumpur di bawah jagaan nenek mereka.

Diputuskan:

(1) Memandangkan versi-versi fakta-fakta yang bercanggah yang ditegaskan oleh pihak-pihak dan tanpa keterangan lisan dan pemeriksaan balas, mahkamah seharusnya tidak menghiraukan alegasi-alegasi yang dipertikaikan. Mahkamah harus memutuskan dengan mengambilkira fakta-fakta yang tidak dipertikaikan (lihat *Gan Koo Kea v Gan Shiow Lih (F)* [2003] 4 MLJ 770). Dalam kes ini anggapan s 88(3) sepatutnya tidak dibiarkan begitu sahaja dalam mengambilkira kesemua faktor-faktor dalam memutuskan penjagaan. (lihat perenggan 15).

(2) Responden tidak mengemukakan bukti-bukti yang mencukupi untuk mematahkan anggapan di bawah s 88(3). Tanpa keterangan yang menentang, adalah salah untuk responden membuat spekulasi bahawa kanak-kanak tersebut akan terjejas dengan pertukaran hak jagaan (lihat perenggan 9, 19 & 24).

(3) Dalam kes ini tiada apa-apa di dalam fakta-fakta yang tidak dipertikaikan yang menunjukkan bahawa pemohon tidak dapat memberikan kanak-kanak tersebut suasana rumah yang selesa. Pemohon bekerja sebagai seorang jurusolek dengan pendapatan lebih kurang RM3,500 sebulan. Tiada apa-apa juga untuk dibangkang terhadap pemohon berhubung dengan keupayaannya mencurahkan kasih sayang terhadap kanak-kanak tersebut (lihat perenggan 20).

(4) Dalam keadaan kes ini, penjagaan kanak-kanak tersebut oleh ibu responden di Kepong, Kuala Lumpur adalah tidak patut. Pemohon bekerja di Johor Bahru sementara responden bekerja di Singapura. Ini menyebabkan kanak-kanak tersebut terpisah daripada ibu dan bapa

mereka yang bermakna kanak-kanak tersebut tidak dapat melihat ibu dan bapa mereka dengan lebih kerap. Dalam usia muda kanak-kanak tersebut, ini adalah jelas tidak wajar. Dengan itu adalah tidak praktikal untuk kanak-kanak tersebut terus tinggal di bawah jagaan ibu responden di Kuala Lumpur (lihat perenggan 22).]

Notes

For cases on custody, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2969–3002.

Cases referred to

Austin v Austin (1865) 35 Beav 259 (folld)
B, Re [1962] 1 All ER 872 (folld)
Gan Koo Kea v Gan Shiow Lih (F) [2003] 4 MLJ 770 (refd)
K Shanta Kumari v Vijayan [1986] 2 MLJ 216 (folld)
L v S [2002] 6 CLJ 106 (refd)
Orr, Re [1972] 2 DLR 77 (folld)
T (a minor), Re (1980) 1 FLR 59 (refd)
Tan Chong Pay v Tan Swee Boon [1997] MLJU 50; [1997] 4 CLJ 625 (refd)
Teh Eng Kim v Yew Peng Siong [1977] 1 MLJ 234 (refd)
Thain, Re [1926] Ch 667 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 88(2)(b), 88(3)

Puspha (KM Ong, Lee & Co) for the appellant.
SF Tan (KF Hua & Partners) for the respondent.

Vernon Ong JC:

[1] This is an application by the applicant wife for custody, care and control of her two daughters with reasonable access for the respondent husband, together with maintenance for the said daughters of RM1,500 per month.

[2] The following affidavits were filed by the parties hereto:

(1) afidavit sokongan affirmed on 20 November 2006 (encl 3);

(2) afidavit balasan (1) responden affirmed on 5 April 2007 (encl 5);

(3) afidavit jawapan pemohon affirmed on 11 July 2007 (encl 6);

(4) afidavit balasan (2) responden affirmed on 14 September 2007 (encl 6A);

(5) afidavit jawapan kepada afidavit balasan (2) responden affirmed on 17 September 2007 (encl 7);

A (6) afidavit balasan (3) responden affirmed on 17 September 2007 (encl 10);

(7) afidavit balasan (4) responden affirmed on 17 September 2007 (encl 12);

B (8) afidavit tambahan kepada afidavit balasan (4) responden affirmed on 1 October 2007 (encl 13);

(9) afidavit jawapan kepada afidavit tambahan kepada afidavit balasan (4) responden affirmed on 11 October 2007 (encl 14);

C (10) afidavit balasan (5) responden affirmed on 24 October 2007 (encl 15); and

(11) afidavit jawapan pemohon kepada afidavit balasan (5) responden affirmed on 5 November 2007.

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BACKGROUND FACTS

[3] The applicant and the respondent's marriage were registered on 28 March 2001. There are two children of the marriage, namely Kong Carmen (f) born on 2 September 2001 and Joey Kong (f) born on 7 May 2003. The children are below the age of seven years at the time of the hearing of this application.

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F **[4]** Since birth the children were in the care of the applicant. The applicant was assisted by her mother who also provided the matrimonial home for the parties. In September 2003, the respondent left for England to work as a chef. During this period he remitted some funds back home to the applicant. He returned to Malaysia sometime in March 2006. Upon his return he stayed at the matrimonial home.

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[5] Sometime in April 2006, arising from matrimonial differences, the respondent left the matrimonial home taking along the children. He brought them to his sister's flat in Sri Alam, Masai, Johor. In May 2006, the applicant went to the Sri Alam flat to visit the children but she was denied access to the children. The respondent's sister subsequently changed or disconnected their house telephone number. This prevented the applicant from communicating with the children.

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I **[6]** Subsequently, around December 2006, the respondent brought the children to stay with his mother in Kuala Lumpur. Thereafter, the children were being cared for by the respondent's mother in Kuala Lumpur. During this period the respondent worked in Singapore. The applicant's access to the children was limited to daylight hours on Sundays only. On a number of

occasions, namely on 12 August 2007, 14 August 2007, 21 August 2007 and 2 September 2007 the applicant was denied access to the children at the respondent's mother's house. The applicant lodged a police report complaining of being denied access to her daughters.

[7] The children are presently being cared for by the respondent's mother in Kuala Lumpur. Currently, the respondent is working in Singapore and the applicant is working in Skudai, Johor Bahru, Johor.

[8] Apart from the abovementioned undisputed facts, there are conflicting allegations of facts evidenced from the numerous affidavits filed by both parties hereto.

THE APPLICANT WIFE'S SUBMISSION

[9] Learned counsel submitted that the presumption under s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 operates in favour of the applicant. The onus is on the respondent husband to rebut the same. It was also submitted that in this case the court had to disregard the disputed facts and decide the case solely on the undisputed facts. In support thereof learned counsel cited *Gan Koo Kea v Gan Shiow Lih (F)* [2003] 4 MLJ 770.

[10] Learned counsel submitted that it can be inferred from the undisputed facts that it is clear that the respondent have attempted to deny the applicant from seeing her children. As the children are below seven years of age, it was submitted that custody ought to be in the applicant's favour. In this case, learned counsel submitted that no evidence was adduced by the respondent to rebut the presumption. In support thereof learned counsel relied on *L v S* [2002] 6 CLJ 106.

[11] Learned counsel also submitted that the children being of tender years needed their mother's care, love and affection. The respondent's contention that the status quo should be maintained cannot be justified against the children's need for their mother's love and care. The children being of tender age are by nature more dependent on their mother than anyone else. In this case the father is working in Singapore and mother is working in Skudai Johor. Both parents are also living apart. Furthermore, the children are being kept in Kuala Lumpur far away from both parents. In the circumstances there must be strong grounds forwarded by the respondent in order to rebut the presumption in favour of the applicant.

THE RESPONDENT HUSBAND'S REPLY

[12] Learned counsel submitted that the children were not forcibly taken

away by the respondent. Reference was made to a joint petition which stated that the parties would have joint custody care and control of the children and that they would stay with the respondent's mother in Kuala Lumpur with reasonable access to the applicant. The joint petition, was, however subsequently abandoned and the parties though separated, remains to this day legally married.

[13] Learned counsel also submitted that the respondent did not deny the applicant access to the children. However, the access was subject to non-disruption of the children's schedule and other conditions. The respondent claimed that the applicant turned up without prior notice and without making any prior arrangements. The respondent has also lodged a police report against the applicant.

[14] Learned counsel submitted that it was undesirable to disturb the children's life by changes of custody. The children were now leading a stable life in a good environment in Kuala Lumpur under the care of their paternal grandmother. As such it was further submitted that there should be continuity of care which provides for stability. To uproot the children from a stable environment and surrender them to an insecure and unknown new environment would be a traumatic experience for them with possible psychological damage. In the circumstances, it was argued, the status quo should be maintained. Learned counsel relied on *Re T (a minor)* (1980) 1 FLR 59 and *Tan Chong Pay v Tan Swee Boon* [1997] MLJU 50; [1997] 4 CLJ 625.

FINDINGS OF THE COURT

[15] In the light of the conflicting versions of facts asserted by each party and in the absence of oral evidence or cross-examination, the court must ignore the disputed allegations. The court must decide by consideration of the undisputed facts (see *Gan Koo Kea* at p 778). In this case, the s 88(3) presumption ought not be held in abeyance in considering all the relevant factors in deciding custody. The plain words of the section must be given effect to mean that where the child concerned is below seven years of age, the presumption should be considered as one of the factors in awarding custody.

[16] In view of the tender age of the children, I would respectfully adopt the following dictum of Sir John Romilly MR in *Austin v Austin* (1865) 35 Beav 259, 263 which was applied by the Federal Court in *Teh Eng Kim v Yew Peng Siong* [1977] 1 MLJ 234.

> Nothing, and no person, and no combination of them, can, in my opinion with regard to a child of tender years, supply the place of a mother, and the welfare of the child is so intimately connected with its being under care of the mother, that no extent of kindness on the part of any other person can supply that place.

[17] The interest of the welfare of the children dictates that the court takes into account their tender age. In *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216, Wan Yahya J (as he then was) said:

> Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. The reason is obvious. An infant of tender age is by nature more physically and spiritually depended on its own mother than anyone else.

And in *Re Orr* [1972] 2 DLR 77 Muloch CJ said:

> In the case of a father and mother living apart and each claiming the custody of a child, the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father...

[18] And in *Re B* [1962] 1 All ER 872 Donovan LJ expressed similar sentiments relating to a child of four years old. He said:

> Prima facie a child of this age ought to remain with his mother and strong grounds are required to justify taking it away.

[19] Applying the above principles in mind I considered the circumstances and competing contentions in this case. The respondent has not adduced sufficient evidence to rebut the presumption under s 88(3). In the absence of evidence to the contrary, it was wrong for the respondent to speculate that the children would be adversely affected by the change in custody.

[20] In this case there is nothing in the undisputed facts to show that the applicant is unable to provide the children with an adequate home environment. The applicant is gainfully employed as a beautician with an income of about RM3,500 a month. There was also nothing to militate against the applicant in respect of her ability to shower love and affection on the children.

[21] With reference to the concerns of learned counsel for the respondent that the children may suffer trauma and psychological damage on being uprooted from a stable environment, there is no medical evidence to suggest that this will be so. The children being of tender age, and in the absence of evidence to the contrary, it would be wrong to speculate that the children would be adversely affected by a change in custody. Accordingly, I would not attach much weight to this aspect of the case. In this regard I respectfully

adopt what Eve J said in *Re Thain* [1926] Ch 676 at p 684 when speaking about the change in custody of a girl of nearly seven who had been brought up by an aunt and uncle since birth:

> It is said the little girl will be greatly distressed and upset at the parting from Mr and Mrs Jones. I can quite understand it may be so, but, at her tender age, one knows from experience how mercifully transcient are the effects of parting and other sorrows, and how soon the novelty of fresh surroundings and new associations effaces the recollection of former days and kind friends, and I cannot attach much weight to this aspect of the case.

[22] In the present circumstances of this case, keeping the children with the respondent's mother in Kepong, Kuala Lumpur would be undesirable. The applicant is working in Skudai, Johor Bahru whilst the respondent is working in Singapore. This places the children far away from both their mother and father. This means that the children will get to see very little of their mother and father. At the children's tender age, this is plainly undesirable. It is therefore impracticable for the children to remain under the care of the respondent's mother in Kepong, Kuala Lumpur.

[23] As far as possible, the children should be as close to their parents as far as circumstances permit. Mindful of the children's tender age it would be preferable for the children to be with their mother; their mother's care, love and affection would provide the much needed succour and support for their growing years.

[24] Having considered all the factors raised by learned counsel for the respondent husband, I find that the presumption under s 88(3) has not been rebutted. I have also exclusively interviewed the children in order to ascertain their wishes pursuant to s 88(2)(b). Both of them appear to be in good health but not very sociable. When asked if they loved their mother, the elder one said that she did not. When asked why, she said that her grandmother told her that her mother was a wastrel. Clearly, the children being of tender age are highly susceptible to such impressions. However, when such negative impressions about their mother are implanted by somebody in authority as their paternal grandmother, the effects could be very damaging to the children, mentally and psychologically. This is not a healthy environment for the children to grow up in.

[25] Having regard to all the circumstances of this case, it is my finding that custody, care and control of the children should be given to the applicant

with reasonable access to the respondent, which I hereby order. The respondent is also ordered to pay the sum of RM1,500 a month as maintenance for the children.

Order accordingly.

Reported by Sally Kee